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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

JOHN KERESTES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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John Kerestes respectfully prays that a writ of certiorari issue to review the judgment of the Seventh Circuit entered in the above case on June 20, 1966.

OPINIONS BELOW

The opinion of the Court below (Appendix A, page app. 1) is not yet reported. The District Court did not write or hand down any opinion.

JURISDICTION

The judgment of the Court below was entered on June 20, 1966 (Appendix A, p. App. 1-9). Petition for rehearing by the petitioner was denied July 19, 1966 (Appendix B, p. App. 10). This petition for certiorari is filed within thirty days of the denial of the petition for rehearing. The jurisdiction of the Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Is an electronic recording of a conversation, delivered to government agents by a government informer witness as a true and correct version of a conversation with a defendant, which conversation is testified about by the witness, in direct examination as a government witness in its case in chief, and the witness is the only person who can verify the truth and accuracy of the recording of the conversation, producible under Section 3500 T.18 U.S.C., and should not the sanctions of that section be invoked where the government does not disclose the recording to the Court of defendants as provided by the statute, and order of the Court?

2. Was the petitioner denied due process and Constitutional rights by refusal to grant a separate trial, when the evidence and trial events made it clear that the petitioner's right to separate consideration of his guilt or innocence of the charges was impossible?

3. Where the petitioner's defense is antagonistic and conflicting with that of the only other one of co-defendants on trial who testifies, and petitioner is powerless to subpoena or compel testimony of other co-defendants on trial who could corroborate him, essentially, on crucial matters, and who choose not to testify, is he not denied protection of the Sixth Amendment, which provides for compulsory process for witnesses in his behalf?

4. Are not the economy and convenience of the Courts and prosecutors outweighed by the need of a defendant for a separate trial to get a fair trial?

5. Where interstate commerce is not obstructed, does the payment of a bribe by a contractor to a city officer come within the purview of Section 1951, T.18, U.S.C., known as the Hobbs Act and the Anti-Racketeering Act?

STATUTES INVOLVED

§ 1951, Title 18, United States Code, Interference with commerce by threats or violence.

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section—
>
> (1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or section 151-188 of Title 45. June 25, 1948, c. 645, 62 Stat. 793.

§ 3481, Title 18, United States Code, Competency of accused

In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him. June 25, 1948, c. 645, 62 Stat. 833.

§ 3500, Title 18, United States Code, Demands for production of statements and reports of witnesses

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States

to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the corrrectness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court

shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term 'statement', as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement. Added Pub.L. 85-269, Sept. 2, 1957, 71 Stat. 595.

STATEMENT OF THE CASE

This is the Petition for Certiorari by John Kerestes from judgment and sentence entered upon a verdict of guilty by a jury on a two-count indictment charging violations of Section 1951, Title 18, U.S.C.

The indictment named five defendants, one, the Mayor of Streator, Illinois, and the other four, including this defendant, were members of the City Council of Streator. Count One charged that commencing on or about November 7, 1960, the defendants, by extortion and obstruction of interstate commerce, attempted to and on May 7, 1961, did obtain a substantial amount of money as a portion of the price for two sewer pumps to be installed in a sewage disposal plant for the City of Streator.

Count Two charged conspiracy to commit the crime charged in Count One. (A. 1-3).

This defendant, John Kerestes, and the other council members moved for severance from the defendant, Mayor Sopher, on the ground that, after arrest, Mayor Sopher had made admissions and statements tending to implicate them, and which statements would not be admissible as heard by the jury if severance was granted. This motion was denied. (A. 4).

A request for particulars was granted in part. (A. 4, 5). Motions for acquittal at close of government evidence and at close of all evidence were denied. (A. 5).

This defendant, Kerestes, renewed his motion for acquittal after verdict, alternatively for new trial, on ground that the Court erred in ruling on the motions for severance; on the motion for bill of particulars; on the charge to the jury; on erroneous admission of evidence; on motions for mistrial including that following the colloquy between the Court and counsel for Sopher during jury arguments; on rulings concerning production of demanded material under 3500, Title 18, U.S.C.; on the motions for acquittal; and on ground that the evidence was insufficient. (A. 5, 6).

The Court sentenced Sopher to four years, and the other defendants, including Kerestes, to three years. (A. 6).

The errors relied on are the obvious prejudice arising from the bitter encounter between the Court and Sopher's counsel in the jury's presence and events leading up to it and its culmination in a sentence of contempt against said counsel, since reversed on appeal. Application of Title 18, Section 3500, U.S.C., and refusal to strike testimony or declare a mistrial; erroneous admission of improper rebuttal; failure to grant severances requested; insufficiency of proper evidence to prove charges made by language of indictment; and errors in instructions to the jury and in refusing proper requests.

EVIDENCE FOR THE PROSECUTION

The government's evidence consisted of the testimony of three salesmen, purporting to describe conversations with Mayor Sopher and the various council members and the testimony of one of the sales representatives, Smith, concerning a conversation and transaction had with Mayor Sopher, alone, long after the delivery and installation of the equipment charged as the subject of obstructed interstate commerce, and substantially after it had been paid for by the City of Streator.

Of the sales representatives, *Charles H. Boender* stated that he entered the promotion of sale of Smith and Loveless sewer pumps equipment on November 7, 1960, in a meeting with Mayor Sopher and councilmen Kerestes, Ryan, Ramza, and Tibbles (A. 7). Boender further stated that after his promotional speech, Sopher asked what it was worth to Sopher for Smith and Loveless to get the job. Someone else said it must be in cash, but Boender did not identify him, and in reply Boender said he would consult his superiors (A. 7).

Boender further testified that he introduced Bowlby, his superior to Sopher on March 29, 1961, and that Sopher told them that "we" went ten percent of the equipment price in cash, and that Bowlby told Sopher that this would require B. Alden Smith's attention (A. 8).

After *Bowlby* took it up with Smith, *Boender* testified that Smith and he visited Kerestes at his employer's funeral home in Streator. Smith asked Kerestes how payment of the 10 per cent could show on the company books, and Kerestes replied that it was Smith's problem and that as far as he was concerned it was a gift with all taxes paid, according to Boender's testimony (A. 8).

Smith testified essentially as did *Boender* concerning this conversation but added that he said he had never done business this way and it would be difficult to account for. According to Smith, Kerestes said "we want cash, tax paid, and it is your problem to get it," (A. 21).

(These conversations with Kerestes, only, were limited in admission to Kerestes, A. 3, 21).

Boender testified that on the day of the Kerestes conversation he and Smith immediately proceeded to see Mayor Sopher, and *Smith* testified that Sopher inquired whether they were going along on the deal. Smith said he told Sopher they did not do business that way and that while he did not say yes or no, he left the impression that he would go along with them (A. 21). Smith said he then went to the FBI and reported the matter.

He was permitted, over objection, to testify that he, Smith, did not feel his company had a chance to obtain the pump contract without payment of 10 per cent of the price (A. 22).

On June 13, 1961, Smith and Loveless received the order for the pumps for a total of $30,868.00 (A. 22).

Smith said that he told Sopher that when all of the money was collected he would complete the deal in a telephone call on *November* 29 *or* 30, 1961, and that final payment by the contractor was received on *February* 15, 1963. Smith then telephoned Sopher, and suggested a meeting at the Water Tower Inn in Chicago for February 27, 1963. Smith testified that Sopher told him he wanted exactly 10 per cent in $50 bills predominately (A. 22).

Smith kept the appointment but Sopher did not appear, and when Smith called him, Sopher said he had forgotten (A. 22). On April 29, 1963, Smith again called Sopher and

they agreed on a meeting at the Water Tower Inn on May 7, 1963, at 5:30 P.M., and Sopher kept this appointment accompanied by his twelve year old daughter (A. 23).

In a conversation later said to be recorded on a wire recorder carried by Smith (A. 54, 56-59), Smith said that Sopher stated that the Commissioners who had not been re-elected, Tibbles and Ryan, were still part of the deal, and knew of the meeting and that the new Commissioners knew nothing of the deal. After various other comments about such deals, Smith gave Sopher $3,087.00 in an envelope whereupon Sopher was arrested by FBI agents (A. 23). At the conclusion of Smith's testimony the transcript shows the Court asked "Do you have the 3500 statements?" and Prosecutor Connelly said the Exhibit Nos. 111-118 for identification had been delivered pursuant to Sec. 3500 of Title 18. (Tr. 293-4.)

The tapes, wire recordings, or transcripts of the recorded conversation with Sopher, which Smith turned over to the FBI were not produced in compliance with Section 3500, T. 18, U.S.C., (A. 51, 52), and the Court refused to examine the materials to determine whether they were producible (A. 52).

Two FBI agents, *Gino Lazzari* and *Robert Tuberson* testified that they listed the numbers of the bills presented by Smith and returned the money to Smith later (A. 26). The agents watched the meeting between Smith, Sopher and Sopher's little daughter and saw Smith and Sopher talk and Smith gave Sopher an envelope, whereupon they arrested Sopher who said the money was a political contribution (A. 27).

The Motion of the defendants for Acquittal at the close of the Government's case was denied (A. 28).

DEFENSE EVIDENCE.

A substantial number of witnesses, of substance in the community of Streator, testified to the good reputation of the defendants for honesty and integrity and as to truth and veracity for Kerestes and Sopher (A. 28).

Dwight Farthing, an engineer, of Streator, said he operated Farthing Brothers, a contracting Company, and that his company had the sewer contract in question (A. 28). Farthing testified that he had chosen Smith and Loveless equipment because it was represented that early delivery was possible and met the prescription of the specifications by Warren and Van Praag. He received no requests from any member of the City government to order it and knew of no reason or influence other than its claimed quality for its designation (A. 30). Although there were several failures of Smith and Loveless equipment and there were compelled replacements by the Company, the material was finally accepted and payment made. He received no pressure from any defendant to pay Smith and Loveless (A. 31).

Farthing further said that he had expressed a preference for Smith and Loveless equipment to Warren and Van Praag, of Decatur, design engineers before the contract was signed (A. 33).

Albert Brensley, an associate of Warren and Van Praag, said his firm designated Smith and Loveless equipment as "base supply", because it was more efficient from his prior experience (A. 34, 35). The witness said payment to Smith and Loveless was held up for failure to perform according to specifications (A. 36).

George Petree, testified that he was a former representative of Stannard Company which sold Smith and Loveless

equipment, and that he had promoted such equipment to Streator as early as 1953 and in 1960 showed movies of the equipment to the Mayor and the council. Petree prepared specifications for the bid of Smith and Loveless and Boender was not connected with such work, to his knowledge (A. 38). No defendant by word or act suggested that there be payment to them for Smith and Loveless obtaining the job. The designation as a "base bid product" was a distinct advantage and he told Smith and Loveless that the plans would permit filling part of the Streator job "out of the book" that is, by standard items (A. 39).

The defendant, *Raymond O. Sopher,* testified that he was the Mayor of Streator during the period involved. Sopher described the development and completion and payments relating to the sewer job substantially the same as had defense witnesses, Farthing and Brensly. While he denied certain conversations testified to by Smith and Boender, he said that financial discussions were purely limited to Smith's and Boender's offers of contributions to the political campaign for 1963 elections (A. 41, 42).

After payments for the pumps were finally completed, Smith called Sopher and suggested a meeting in Chicago to take care of the political contribution matter. After two invitations to meetings which Sopher failed to attend, he did meet Smith at the Little Egypt Room of the Walter Tower Inn at Chicago on May 7, 1963. Within two or three minutes Smith handed him an envelope. They then discussed the Streator election and troubles with the equipment (A. 43).

On cross-examination Sopher said that it was about November 7, 1960, that Boender offered him a political contribution. He did not recall that Boender talked to him *and the other Commissioners* on November 7, 1960. The

equipment was not finally selected by the council or the Mayor but by Warren and Van Praag. Sopher denied that he told Bowlby that his equipment would be accepted only if they got 10 per cent of the price (A. 44, 45).

After questions related to the conversation at the meeting of May 7, 1963, at the Water Tower Inn, the prosecutor switched to a series of questions obviously based on a transcript of verbatim questions in his hands (A. 46). The questions are in the abstract contained in the Appendix at pages A. 46 to 50. Smith answered that he did not recall to these questions purporting to relate verbatim conversation (A. 46).

The Court refused to inquire of the jury concerning the effect of statements made by the prosecutor, to the effect that he was doing pretty well and that the Mayor was still on cross-examination, made during a recess (A. 50). A motion for mistrial was denied.

At this point the Court's attention was called to the prosecutor's use of the transcript of recorded conversation between Sopher and Smith and the defense contention that the recordings were producible under Section 3500, Title 18. The Court stated that he did not previously know of the recording, but ruled the transcript or tape was not producible, and the motion to strike Smith's testimony or for mistrial was denied (A. 51).

This defendant-appellant, Kerestes, and Ramza, Ryan and Tibbles further moved for severance, which was denied (A. 51).

A defense motion for production of the record of the conversations was denied, as was a motion for mistrial for the government's refusal, the Court giving his conclusion that the recordings were not statements under 18 U.S.C. 3500. The prosecutor insisted that the government had

delivered all statements that complied with 18 U.S.C. 3500 (A. 52).

On further cross-examination by counsel for the co-defendants, over objection, Sopher testified that he and the other councilmen viewed the Chicago Pump Company product before the contract was let in June of 1961. That none of the other defendants authorized him to accept contributions on their behalf and he did not tell them he was going to Chicago to get such contribution and he did not relate the tenor of his conversation concering Bowlby's offer to other councilmen. Boender's first offer of a political contribution was out of their presence (A. 53).

Counsel for Sopher asked for production of subpoenaed recordings and transcripts and that since the Court viewed these as similar to photos of conversations, they were objects subject to subpoena, under this view, since the prosecution did not claim them to be privileged. The Court took the government's motion to quash under reservation (A. 53), and denied it shortly thereafter (A. 54).

Isabel Sopher, wife of Mayor Sopher, testified that B. Alden Smith called their home three times between the middle and end of April, 1963 (A. 54).

John Kerestes, this defendant-appellant, testified on his own behalf that he had no knowledge of any attempt to secure money by any member of the council or the Mayor until told on his arrest. He denied any conversations on this subject other than a statement by Smith that he would give him a boat. Kerestes told him he wanted nothing other than that the city get a good installation. Kerestes said he was employed by his father-in-law as an embalmer in a family funeral home business, had graduated from Purdue University in 1951, and served in the Marine Corps (A. 54, 55, 56).

A colloquy regarding a stipulation concerning the wire recording from which a tape recording is abstracted at A. 56, 57. The Court proposed a stipulation that the questions asked on cross-examination by the prosecutor represented an accurate recitation of the portion of the conversation referred to in the cross-examination. His stated reason was that it seemed desirable not to accumulate evidence by playing the entire conversation tape (A. 56). Agreement was not final or complete.

GOVERNMENT REBUTTAL

B. Alden Smith, who testified in the Government case in chief, told of receiving a pocket recording device on May 7, 1963, prior to meeting defendant, Sopher; that he heard the device play and that it truly recorded and portrayed the entire conversation had with Sopher (A. 57).

The *Court* asked if the device remained "on" during the entire conversations and Smith said, "Yes, sir."

On cross-examination Smith admitted he was instructed in use of the machine by the FBI prior to using it. He knew he was to return it with the recording on it to the FBI and was working under FBI direction (A. 57, 58).

Agent *John Golden* of the FBI said the wire recorder was so attached to Smith that Smith could turn it on or off. It was still operating when he recovered it from Smith (A. 58).

Agents Tuberson and Noonan testified that the tape was a copy made from the wire recording and was identical. Noonan admitted he did not know whether the recording reflected all that transpired (A. 58).

The Court then stated that there was a stipulation regarding the prosecutor's reading of statements "in that cross-examination" as being true and correct (A. 59).

Motions for acquittal at the close of all evidence were denied (A. 59).

REASONS FOR GRANTING THE WRIT

This Court should issue its Writ of Certiorari to review the decision of the Court of Appeals for the Seventh Circuit for the following reasons:

1. The Seventh Circuit Court of Appeals, by its decision, has impressed a test for production of witness statements under Section 3500 T.18 U.S.C. which is not in the statute or prior decisions, to wit:

> "It is *not a recital of a past occurrence by a prospective witness* and is not within the general purview of § 3500." (Page 6 of opinion of Court of Appeals.) (Emphasis *infra.*)

2. In the light of the current common use of electronic devices and recordings by the government, it is necessary that this Court rule on whether an electronic recording of a two-party conversation given to Agents by a participant government informer witness as a purported true and accurate recording of a conversation had by the witness and a defendant, with no one else present, in fact, or as an electronic eavesdropper, is producible under Section 3500 T.18 U.S.C., when the witness completes his direct testimony describing the conversation but omitting reference to the recording in the prosecutor's possession.

3. Does not the government's concealment of the delivery to it and possession by the prosecutor while a government witness testifies of an electronic recording of a conversation made by the witness of a conversation testified to by him on direct examination, in the government's case in chief, and failure to produce it on request, and order of the Court, to produce under Section 3500 T.18 U.S.C. require the striking of the testimony of such witness,

or the declaration of a mistrial or some sanction suggested by the cited Statute?

4. The conflict between the economy and convenience of joint trials and the right to a fair trial and separate consideration of one's own innocence or guilt involved in grant or denial of severance to antagonistic co-defendants when the schism in the ranks of the defendants is clear from the arrest, return of indictment and attendant publicity, and the evidence, deserves the attention and review of this Court to prevent injustice.

5. Where a conflict arises between testifying co-defendants, the inability of either, to call the non-testifying defendants on a joint trial destroys the provision of the Sixth Amendment to the Constitution, which provides:

> "• • • the accused shall enjoy the right • • • to have compulsory process for obtaining witnesses in his favor,"

it becomes necessary to decide whether Section 3481 T.18 U.S.C. giving an *accused* the right to be a witness on request and the Fifth Amendment providing:

> "No person • • • shall be compelled in any criminal case *to be a witness against himself,* nor be deprived of life, liberty, or property, *without due process* of law;" (emphasis supplied)

or whether such Constitutional sections control (or even *should*) prevail over a custom of facility of courts and prosecutors which seems to demand efficiency of disposition by joint trial of multiple defendants regardless of the Constitutional and Congressional commandments, 3481 T.18 U.S.C.

5. In the case at bar, the petitioner denied knowledge of any intention or act to secure money from the government informer witnesses, but a co-defendant admitted re-

ceiving money which was immediately seized by government agents, from a man who claimed it as a "political contribution", and three co-defendants did not choose to testify. Thus, the petitioner was denied the testimony of three men who denied each and every material allegation of the charge by their pleas of not guilty, and was thus denied a fair trial. Should he not have a fair separate trial where he could subpoena them?

6. The use of the statute, Section 1951 T.18 U.S.C., as a basis for prosecution of the conduct outlined by the evidence unduly extends the sense and purpose of the law, and seeks an extension of federal jurisdiction over purely local misconduct by petty local officials, not federal under any construction and not really effective on commerce.

7. The trial judge so strongly indicated his disapproval of conduct, possibly justified, by a co-defendant's lawyer, by "landing on him with both feet" in the presence of the jury, A. 64, that none of the defendants could be fairly tried. The incident resulted in a One Thousand Dollar fine on the lawyer, which judgment was reversed by the Seventh Circuit Court of Appeals in a collateral proceeding. Thus, the lawyer escaped, but the defendants went to the jury with the trial judge's castigation ringing in their ears. Did this petitioner, who himself or by counsel was no part of these mishaps, receive a fair trial?

8. An instruction which tells a jury that if it *believes* the testimony of a defendant, it must find the defendant not guilty, shifts the burden of the prosecution to the defense.

If, from the government evidence and the defense evidence, where there is any, it appears that there is a reasonable doubt, then there must be an acquittal.

No matter how slight, or even short of belief, evidence may be, if there is a doubt of guilt, the accused must be acquitted. The defense has no *degree,* like *belief,* of proof as is required of the prosecution which must prove beyond a reasonable doubt (or to a moral certainty). The instruction, it is believed, was erroneously included from civil instructions where the burdens of proof shift and have different nuances.

9. Should not this Court declare that as to joint trials, fair trial for any accused requires a separate trial, if necessary or indicated for fairness.

10. This Court should limit the rising tendency of prosecutors to bring multiple defendant indictments by providing that separate trials be granted to antagonistic defendants. Discretion is too often abused in the name of economy and prosecutive convenience and efficiency, to deny separate consideration of individual guilt or innocence.

ARGUMENT

I.

There Was Substantial And Prejudicial Error in Rulings On Section 3500, Title 18, United States Code.

The deliberate concealment from the Court and defendants of the existence of corroboration by mechanical electrical recording of what Smith said was his conversation with Sopher at the Water Tower Inn induced substantial error which grew into overwhelming circumstances under which the defendant Kerestes and the other councilmen could not get a fair trial.

Nothing in Smith's direct or cross examination indicated existence of such a record and its having been delivered to the F.B.I. by him as such a wire recording.

At the close of the direct examination of Smith, the following occurred (Tr. 293-4):

> "Mr. Connelly: No further questions.
>
> Just one moment. I do have one thing.
>
> The Court: Do you have the 3500 statements?
>
> Mr. Connelly: They have been given to them already, your Honor. Let the record show that the statements of this witness—
>
> The Court: Just give the exhibit numbers, Mr. Connelly.
>
> Mr. Connelly: Yes, your Honor. Government Exhibit 111 for identification, 112 for identification, 113 for identification, 114 for identification, 115 for identification, 116 for identification, 117 for identification,

118 for identification, various dates from April 11, 1961 to May 9, 1963, have been turned over to defense counsel pursuant to Section 3500 of Title 18.

The Court: All right."

This was, of course, an intentional (not charged as corrupt or venal) concealment of the recorded conversation of Smith, the witness, who had delivered to the F.B.I. a recording of what he said and claimed occurred at the meeting.

Nevertheless, the recording which Smith gave to the F.B.I., none of them present, represents the mechanical and electronic recording of Sopher, *but also* that of Smith. It is Smith's statement of what happened, and was so intended by him when he delivered it to the F.B.I.

It is a record within 3500, T. 18, U.S.C.

Refusal to produce such under 3500, Title 18, U.S.C., calls for striking the evidence of the witness or dismissal of the case.

The prosecutor deliberately chose to conceal the record of the conversation at points where it would have been helpful to the defendants for cross examination or in any other way. The Judge improperly, in the presence of the jury, said "Do you have any 3500 Statements"? The prosecutor's unctuous and jury laboring device of insisting on reciting each document produced does not justify appellate forgiveness for failure to produce the recorded statements of Smith and Sopher under Smith's vouchsafe of genuineness to the F.B.I., *Schoppel* v. *United States*, 270 F. 2d 413; and directly on propriety of 3500 T. 18 requests and production before the jury, *Johnson* v. *United States*, (C.A. D.C.) 347 F. 2d 803, 805, 806, decided June 16, 1965.

Later, the record shows the Court said that no knowledge of these recordings had come to his attention (A. 5, Tr. 910-911).

The prosecutor was brave to claim his concealment and said that *he* had turned over to the defense every statement of every witness that complied with Section 3500, (A. 52, Tr. 942-943). His usurpation of the trial Judge's function was complete, *United States* v. *Accardo,* 298 F.2d 133.

The Court below continued in refusal to compel production of these statements or recordings even though they were subpoenaed, which is a substantial request. The statement or recorded statement certainly would have aided the defense in cross examination of Smith, and to the extent that the prosecutor intended it should damage and prejudice, unfairly, all defendants, it could have assisted the co-defendants in cross examination of Sopher.

Brady v. *Maryland,* 373 U.S. 83, 10 L. Ed. 2nd 215, 83 S.Ct. 1194, contains the following:

> "*We now hold* that the suppression by the prosecutor of evidence favorable to an accused *upon request* violates due process where the evidence is material *either* to *guilt* or *punishment, irrespective* of the good faith of the prosecution." (Emphasis supplied).

II.

The Denial Of The Motions For Separate Trial Require A New Trial.

A. The Motion For Severance Before Trial Should Have Been Granted.

From the evidence, obviously in the possession of the government, it was apparent on return of the indictment that a fair trial could not ensue without a trial of the four members of the council of Streator separate from

that of Mayor Sopher. Immediately after his arrest on May 7, 1963 in Chicago, at the Water Tower Inn, Mayor Sopher was vehement and diligent on television, radio and presswise in proclaiming that he had received money from Smith, but that it was a political contribution (A. 27).

These statements to Agents Lazzari and Tuberson of the F.B.I., although limited to Sopher by Court ruling, demonstrate that Kerestes' motion for severance was sound (A. 68-72). Kerestes' motion stated his fear of just such prejudicial material going to the jury upon a joint trial. The fact of Sopher's statements upon arrest were well known to the prosecutors, the Court and the defendant at the time the motions were made, by reason of the exhibits, attached to the motions, which showed newspaper accounts of Sopher's statements and implication of the other defendants, including Kerestes.

Of course, their defenses *were antagonistic*. Kerestes denied all knowledge of any money demands or offers and of Sopher's trips to obtain it. Sopher's defense was that he was obtaining a political contribution for himself and the council members which had been offered by frequent importuning by Smith (A. 27 and see exhibits attached to Kerestes' motion for severance). (A. 4, R. 68-72).

Sopher would not have been a witness upon a separate trial of the other council members, or Kerestes alone, if severance had been granted. All of the damage to his forthright denials of knowledge, participation and criminatory conversations done by Sopher's appearance on the stand, the misused recorded conversation of Sopher and Smith, the altercation between the Judge and Sopher's counsel would have been non-existent in a separate trial

from Sopher. The damage was irreparable. It was discernible at the time of the original motions for separate trial and they should have been granted.

Very simple and brief inquiry of the prosecutors could have satisfied the suspicion of probable prejudice from joint trial that must have been aroused by the motions and the common knowledge of the highly publicized events surrounding Sopher's arrest and statements of purported defense. *Barton* v. *United States,* 263 F.2d 894, 898 (5th Cir. 1959); *United States* v. *Kahaner,* 203 F. Supp. 78, 80-81 (S.D.N.Y. 1962); *Schaffer* v. *United States,* 221 F.2d 17, 19 (5th Cir. 1955); *Brady* v. *United States,* 29 F.2d 312, 313 (8th Circuit).

B. The Evidence And Trial Events Required a Mistrial And Order Of Severance To Kerestes From Sopher.

Of course, the government will contend that the grant of the motions was a matter of discretion not to be disturbed upon appeal. It is contended that under the circumstances in this case there was an abuse of discretion because the subsequent trial events could be forecast easily by exercise of discretion and very slight inquiry by the trial judge.

However, the events of the trial demonstrate without question that it was easily discernible that Kerestes and the other councilmen were irreparably damaged by joint trial with Sopher. His testimony on the stand, to meet the testimony of Smith regarding the meeting of May 7, 1963 at Water Tower Inn and the subsequent disastrous use of the wire recording, Exhibit 14, and the unfortunate resulting events culminating in a finding of contempt against a lawyer, were matters completely outside the control of Kerestes and his fellow councilmen, on trial.

These matters, however, certainly made it clear that it is impossible to say that the verdict against Kerestes did

not in part rest on matters not admissible as to him, and against which he could only be protected by severance from Sopher. It is not sufficient to say that there was sufficient evidence proper against him, if believed, to convict him. It is necessary that the verdict of guilty must have been arrived at free of undue and improper influences and prejudices, even if slight. In this case the improper influences were overwhelming in the eyes of the jurors and far overshadowed the simple defense of Kerestes.

When this situation arose the grant of separate trial was no longer a matter of discretion. It became a right of the defendant collateral to his right to a fair trial. *United States* v. *Haupt,* (C.A. 7), 136 F.2d 661, 673; *Ingram* v. *United States,* 272 F.2d 567; *United States* v. *Decker,* 51 F. Supp. 20, 25, 26.

C. The Inability Of Kerestes In A Joint Trial To Compel Effective Testimony From His Co-defendants Deprived Him Of A Fair Trial And Should Have Caused A Separate Trial.

While afflicted with the problems arising from Sopher's antagonistic defense and testimony and extra-judicial inadmissible statements, Kerestes also suffered from the disadvantage of being deprived of compulsory process for witnesses in his behalf who had knowledge concerning transactions, events and conversations in issue. He was unable under the law to call upon Ryan, Tibbles or Ramza, other co-defendants in the joint trial for their evidence to support his defense.

It is submitted that under the excellent reasoning of the recent decision of this Court in *United States* v. *Echeles,* No. 14774 decided September 2, 1965, it appears that two Constitutional rights are involved to an extent which would bar a joint trial under the circumstances of this case.

The *Echeles* decision reversed because of Echeles' disability to violate his co-defendants' right to incriminate themselves and eligibility for the witness stand *only* at *their* (co-defendants') *own* request.

The cases cited therein make it clear that a defendant may not be called upon to testify at all. *United States Housing Foundation of America, Inc.*, 176 F.2d 665, 666 (C.A. 3); *United States* v. *Keenan*, 267 F.2d 118, 126 (C.A. 7, 1959); *United States* v. *Benjamin*, 120 F.2d 521, 522 (C.A. 2, 1941); *Poretto* v. *United States*, 196 F.2d 392, 394 (C.A. 5, 1952).

Nor may his silence be commented on. *De Luna* v. *United States*, 308 F.2d 140, 141 (C.A. 5, 1962).

Thus, in the case at bar, Kerestes was helpless to require testimony from his fellow councilmen as to the events in issue as to which they had knowledge. Certainly their silence and failure to take the stand prejudiced them and Kerestes despite the Court's mild and sparse instruction against inferences to be drawn from defendant's failure to testify.

The appropriate application of the Sixth Amendment providing for compulsory process for witnesses in his behalf and the protection of the Fifth Amendment and Section 3481, Title 18, United States Code, against compelling a defendant to take the witness stand at his own trial is the grant of separate trial upon request when the government has caused joinder of two or more defendants.

United States v. *Echeles*, (C.A. 7) (Rehearing *En Banc* denied) 352 F.2d 893.

Fifth Amendment.

§ 3481, T. 18, U.S.C.

Sixth Amendment U.S. Constitution.

CONCLUSION

Wherefore, this Petitioner prays this Court issue its Writ of Certiorari to review the decision of the Court of Appeals for the Seventh Circuit entered herein.

Respectfully submitted,

MAURICE J. WALSH,
Attorney for Petitioner.

APPENDIX A.

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 15057-15061

SEPTEMBER TERM, 1965—APRIL SESSION, 1966

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

RAYMOND O. SOPHER, JOHN KERESTES, JOHN A. RAMZA, MICHAEL F. RYAN and MATTHEW J. TIBBLES,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

JUNE 20, 1966

Before DUFFY, SCHNACKENBERG and KNOCH, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* Raymond O. Sopher, John Kerestes, John A. Ramza, Michael R. Ryan and Matthew J. Tibbles, defendants, appeal from their convictions of a violation of 18 U.S.C. § 1951. They were tried by a jury and the court sentenced them to prison terms.

Sopher was the mayor of Streator, Illinois, and his co-defendants were commissioners thereof.[1]

Count I of the indictment charged defendants with having obstructed interstate commerce by extortion and count II charged them with conspiracy to commit the offense alleged in court I, all in violation of the Hobbs Act, 18 U.S.C. § 1951.

There was evidence tending to prove the following facts:

On November 7, 1960, Charles H. Boender, a sales representative of Stannard Power Equipment Company, which was agent in Streator for Smith & Loveless, made a sales talk to said defendants on a proposed sewer project in that city. Whereupon Sopher asked Boender "what it was worth" to him to get the job. An unidentified commissioner stated that "it must be in cash".

On January 5, 1961, independent engineers Warren & Van Praag, Inc., submitted plans and specifications for the project, wherein Smith & Loveless was designated as the base bid supplier for the package lift stations.

On March 28, 1961, in Boender's presence, president Bowlby of Stannard thanked Sopher for the consideration being given Smith & Loveless equipment and expressed the hope that the company was going to be successful in doing business with the contractor. Sopher replied that this was possible, provided they received in cash 10% of the contract or bid price in connection with such an agreement. In addition Sopher suggested that the price could be increased by $3,000 to take care of the internal revenue tax. However, Bowlby told Sopher that Stannard Company could not participate but that he would relate the proposition to Smith & Loveless.

---

[1] 24 Ill. Rev. Stat. 1965, art. 4.

On April 10, 1961, Boender and Smith, managing director of Smith & Loveless, met in Streator. Being unable to locate Sopher, they called on defendant Kerestes, who said he had explained to Boender previously that "we wanted 10 percent of your bid price to the contractor to have the city approve" the use of Smith & Loveless equipment. When Smith asked how "we might accomplish the matter of providing this money" Kerestes explained: "* * * we want the cash, we want it tax paid, and it is your problem how you get it." * * *"

Finding Mayor Sopher at the city hall, Boender and Smith were told by him: "We want 10 percent of the bid price in cash." While Smith made no commitment, he testified that he left Sopher with the impression that "I probably would [go along with the deal]", thus leaving the matter in abeyance so that the Federal Bureau of Investigation could be contacted, which was done on April 11, 1961.

On April 17, 1961, Farthing Brothers, general contractors, after having received bids from the subcontractors, made sealed bids on pump stations manufactured by Smith & Loveless, Chicago Pump Company and TexVit. Farthing Brothers was the lowest bidder on the total sewage project.

On April 19, 1961, Boender telephoned Sopher and asked whether he was satisfied with the arrangements made between Sopher and Smith. Sopher said that he was and that he would have to satisfy "the commissioners".

On June 7, 1961, a contract was entered into between the city and Farthing Brothers in which Smith & Loveless was the only subcontractor specifically named. Both Boender and Smith believed that Smith & Loveless received the contract because of the agreement to pay the 10% of its contract price of $30,868.

On February 15, 1963, Smith & Loveless received its final payment from Farthing Brothers and three days later Sopher called Boender to arrange a meeting.

On May 7, 1963, Smith, Sopher and his twelve-year-old daughter met in a room in a Chicago hotel. On Smith's person federal agents had a hidden recording device, and $3,087 in identified money. The recorded conversation thereon is in conformity with the facts herein enumerated, culminating in Smith's statement "* * * well, I might as well give you the money," (which he did). Federal agents then appeared, arrested Sopher and recovered the listed money. Whereupon Sopher contended the money received was a political contribution.

1. We hold that the evidence supports the charges in the indictment and that the indictment includes all elements of the offenses charged.

As the Supreme Court said in *Stirone* v. *United States,* 361 U.S. 212 (1960) at 215:

> "* * * It was to free commerce from such destructive burdens that the Hobbs Act was passed. *United States* v. *Green,* 350 U.S. 415, 420."

and at 218, the court added:

> "* * * there are two essential elements of a Hobbs Act crime: interference with commerce, and extortion. * * *"

We agree with government counsel when they say that the conduct of defendants necessarily produced a fear of economic loss by Smith & Loveless. *United States* v. *Kramer,* 7 Cir., 355 F.2d 891, 897 (1966).

We hold that the violations of the Hobbs Act charged in the indictment were supported by the proof in the record.

2. However, defendants contend that the transcript and tape recording of the conversation on May 7, 1963 between Smith and Mayor Sopher were statements producible under 18 U.S.C.A. § 3500. There were motions by the defense to strike the testimony of Smith, grant a mistrial, and to produce said statements, which were respectively denied.

While the record indicates that the government turned over to the defendants various statements of witnesses in compliance with § 3500, it took the position below and also in this court that the court did not err in denying defendants' motion for the production of the tape recording of the May 7, 1963 conversation and the transcript thereof. The district court took the position that § 3500 does not encompass the tape recording of that conversation.

A § 3500 statement is a recorded recital of past occurrences made by a prospective prosecution witness. From its very nature, necessarily it is made after those events have taken place. If a prosecutor, in reliance on the statement, uses as a witness the maker thereof as a part of the government's case, the statement must be produced for the use of defense counsel. But a concurrent tape recording of a conversation between the payer and the recipient of an alleged cash bribe is obviously of contemporaneous sounds. The result is a preservation of a conversation just as it was spoken. It is direct evidence relevant on the issue of the alleged guilt of the defendants on trial. Made when the allegedly extorted bribe money was being paid, the tape recording in this case is of the actual voices of the briber and the bribee. It is therefore *not a recital of a past occurrence by a prospective witness* and is not within the general purview of § 3500. Moreover,

it does not fall within the technical requirements of paragraph (e)[2] thereof, because it is not a written statement made and signed by a government witness or adopted or approved by him, nor is it a recording or transcription thereof which is a substantially verbatim recital of an oral statement by said witness *to an agent of the government,* contemporaneously recorded with the making of such oral statement.

We hold that there was no error committed in the denial of the motions of defendants to strike Smith's testimony and for an order for production of said statements, or to grant a mistrial.

3. During the government's case in chief, Smith testified as to the May 7, 1963 conversation with Sopher at th Walter Tower Inn. Sopher, as a defense witness, under cross-examination answered evasively when asked about statements contained in the recording attributed to him by Smith, who testified that he recognized Sopher's voice when the playing of the tape was repeated.

A transcript of the tape had been delivered by the government to defense counsel at their suggestion. The tape was played in their presence, but outside the presence

---

[2] § 3500 (e) The terms "'statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement. * * *

of the jury and of any spectators, after the defendants severally and personally agreed to the procedure.

Counsel for Sopher assumes in this court that "certain parts of the conversation as testified to by Sopher, were not on the tape" and he points out as "a possible explanation" that he reminded the jury that Smith controlled the operation of the recording device "and could" delete statements by Sopher which were not to his liking, by pushing the "off" button. Sopher's counsel points out that the Federal Bureau of Investigation agent had instructed Smith in the mechanical use of the recording device.

On rebuttal by the government, Smith testified that the tape recording fully, truly and accurately portrayed the conversation with Sopher on the occasion in question. He further testified that only general instructions regarding the operation of the device were given. Moreover, the lack of a basis for the attack on the reliability of the tape was acknowledged by counsel for Sopher, when he then stated:

> "Vis-a-vis my comments just before the recess, I should like the jury to understand that in my opinion the record will not sustain the inference that the machine which Mr. Smith had fastened to his body on May 7, 1963, was in fact turned on or off by Smith during that conversation, and I think it also will not sustain the inference that there was matter on that tape which tended to corroborate Mayor Sopher's version of the conversation but which was not stipulated to."

As a matter of fact, our attention has not been directed to any conversation on the occasion in the Water Tower Inn which the tape failed to record. It is therefore improper for us to speculate what would be missing from the record if Smith had arrested the operation of the machine temporarily at any time.

4. Defendant Kerestes contends that the court erred in failing to grant him a severance from Sopher, on the ground that the latter had made admissions and statements tending to implicate Kerestes, and also that he was unable in a joint trial with Sopher to compel effective testimony from his co-defendant. We fail to find sufficient basis in the record for reversing, especially as all defendants were charged as members of a conspiracy under count II of the indictment. Certainly the matter of a severance was within the sound discretion of the district judge and there is nothing in the record to indicate an abuse of such discretion when the motion for severance was overruled. *Opper* v. *United States,* 348 U.S. 84, 95 (1954).

We find no other ground advanced by Kerestes for a reversal sufficient to justify that action.

5. Under all the circumstances shown by the record, we hold that the court properly denied the respective motions for severance, judgment of acquittal, mistrial and a new trial by defendants Ramza, Ryan and Tibbles.

We have considered their contentions that there was a fatal variance between the indictment and the proof. Their counsel reason that the indictment alleged defendants threatened Smith & Loveless, Inc. that its bid would not be accepted unless it agreed to make a payment to them, whereas the evidence showed that Smith & Loveless only made a proposal to the general contractor for the work. We find there was evidence tending to prove that defendants' conduct necessarily produced a fear of economic loss by Smith & Loveless. This evidence is sufficient to support the jury's verdict, on the theory that money had been extorted by defendants by fear, induced by threats

that a bid of the contractor would not be accepted unless Smith & Loveless agreed to pay 10% of the bid price, thereby affecting interstate commerce.

6. We have examined the instructions and considered the objections thereto raised by defendants in this court. We find the objections not well taken.

7. While there is a criticism of the action of the trial court in what counsel for defendants, Ramza, Ryan and Tibbles say was a reprimand of Sopher's trial counsel, our reading of the entire transcript convinces us that it was not prejudicial to the defendants in any way.

8. Defendants Ramza, Ryan and Tibbles contend that the court committed error in admitting in evidence conversations at the May 7, 1963 meeting between Sopher and Smith which were made "after the completion of the conspiracy." However, we do not agree that the conspiracy had ended when these conversations took place. The conspiracy was still in effect when the meeting took place, the money was obtained by Sopher, and each of the participating persons (Sopher and Smith) continued in their discussion as to the payment of the money to Sopher and its subsequent disbursement to the other defendants in their respective shares. The conspiracy did not terminate until the arrest of Sopher.

For all these reasons, the judgments from which these appeals were taken are affirmed.

JUDGMENTS AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Tuesday, July 19, 1966

Before

Hon. F. Ryan Duffy, Circuit Judge
Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Win G. Knoch, Circuit Judge

United States of America,
Plaintiff-Appellee,

No. 15057,
58, 59, vs.
15060, 61

Raymond O. Sopher, et al.,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

It Is Ordered by the Court that all the petitions for rehearing filed by the appellants herein be, and the same are hereby Denied.

Office-Supreme Court, U.S.
FILED
AUG 18 1966
JOHN F. DAVIS, CLERK

No. 455

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

RAYMOND O. SOPHER, JOHN A. RAMZA, MICHAEL F. RYAN and MATTHEW TIBBLES,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

FRANK W. OLIVER
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Appendix—

A. Opinion of the United States Court of Appeals for the Seventh Circuit, filed June 20, 1966 ....App. 1

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No.

RAYMOND O. SOPHER, JOHN A. RAMZA, MICHAEL F. RYAN and MATTHEW TIBBLES,

Petitioners,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners, Raymond O. Sopher, John A. Ramza, Michael F. Ryan and Matthew Tibbles, pray that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in the above case.

OPINION FROM THE COURT BELOW

The United States Court of Appeals for the Seventh Circuit affirmed petitioners' convictions on June 20, 1966. The opinion has not yet been reported. It is printed with this petition as Appendix A.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on June 20, 1966. Rehearing was denied on July 19, 1966. The jurisdiction of this court is invoked under Title 28, U.S.C., Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Where a prospective witness is equipped with a hidden tape recorder by the FBI before meeting a defendant, and then under the observation of the FBI, talks to the defendant, immediately following which the defendant is arrested by the observing agents, immediately following which the witness turns the taped conversation over to the FBI, then is that conversation thus taped a statement required to be produced under 18 U.S.C. 3500, where that statement consists primarily in an account by the witness of his own version of his previous dealings with the several defendants on trial?

2. Where the government witnesses have, during the course of an alleged conspiracy, made tape recordings of allegedly damaging conversations between themselves and the ultimate defendants, to which conversations the witnesses testify, can the trial court properly quash defense subpoenas designed to secure production of the recordings for use as evidence during the presentation of the defense?

3. Is a defendant deprived of effective assistance of counsel, and of a fair trial, where the trial judge permits the government to argue to the jury that such defendant stipulated he lied on the witness stand, holds defense counsel in contempt of court when defense counsel states the actual stipulation to the jury, and further, by means of threats to punish defense counsel, requires defense counsel

to withdraw his previous remarks to the jury, and requires defense counsel to substitute remarks in tenor with the trial judge's and prosecutor's view of things.

Is the Court of Appeals correct in ruling that the defendant waives his right to have it urged to the jury that he testified truthfully, when under compulsion of the judge's threats his lawyer withdraws from the jury's consideration an interpretation of the evidence consistent with his veracity, substituting instead an interpretation favored by the judge and prosecutor?

Where counsel for the central defendant in a conspiracy case is compelled by the threats of the trial judge to present the case to the jury in the light most favorable to the prosecution, are not all defendants improperly prejudiced?

CONSTITUTIONAL PROVISIONS INVOLVED

In relevant part, the Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATUTORY PROVISIONS INVOLVED

In relevant part, statutes provide:

18 U.S.C. 1951 (a) Whoever . . . obstructs . . . the movement of any article . . . in commerce . . . by extortion . . . [shall be punished] . . .

(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of . . . fear . . .

18 U.S.C. 3500 (e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement. • • •

STATEMENT OF THE CASE.

Petitioners Sopher, Ryan, Ramza, and Tibbles were, respectively, the mayor and the commissioners (city council) of Streator, Illinois. They, and a fourth commissioner (Kerestes) were jointly indicted and tried in the Northern District of Illinois on a substantive count charging obstruction of interstate commerce by extortion and a second count charging a conspiracy to commit the substantive offense.

All defendants were found guilty after a jury trial. Defendant Sopher was sentenced to four years imprisonment, each of the other defendants to three years.

The United States Court of Appeals affirmed the convictions and denied the petitions for rehearing on June 20 and July 19, 1966, respectively.

STATEMENT OF FACTS.

According to the government's evidence, in 1960 the City of Streator required extensive additions and repairs to its sewage system. Independent consulting engineers were retained to draw plans and interested suppliers of

equipment sought to obtain favorable consideration of their own products by the mayor and the commissioners. Smith & Loveless of Lenexa, Kansas, urged use of their "package lift stations" in the system. Stannard Power and Equipment, of Chicago was the local Smith & Loveless sales agent.

In March and April, 1961, according to the government, Sopher on two occasions and Kerestes on one, told Boender and Bowlby, Stannard employees, and B. Alden Smith, managing director of Smith & Loveless, that the latter's equipment would be used if they agreed to pay 10% of the successfully bidding contractor's price for the equipment, in cash.

Smith made no commitment, but left Sopher with the impression that he would go along. Thereafter general contractors bid the project and on June 7, 1961, the low bidder was awarded the contract. On July 8, 1961, Smith & Loveless got an order from the general contractor for lift stations for $30,868. In February, 1963, after the work was completed, Smith & Loveless received final payment from the contractor. Sopher made arrangements to meet Smith but failed to appear at that meeting. Later, another meeting was arranged.

On May 7, 1963 Smith, carrying a concealed tape recorder, gave money previously identified by the FBI to Sopher in Chicago. Before passing the money, Smith, as recorded on the secret tape, stated to Sopher his version of their arrangements. When Smith handed an envelope containing $3,087 to Sopher, Sopher was arrested by FBI agents. Sopher protested at once that Smith had made a political contribution.

The defense evidence differed in material particulars.

Defendant Kerestes denied knowledge of the arrangement championed by the government's evidence, indeed he had rejected an effort by Smith to corrupt him (A. 54-55).

Defendant Sopher likewise denied the arrangement fit the government format, explaining that the offer had originated from Stannard and Smith & Loveless in the form of a suggestion that if their stations were used "they" would like to help the defendants at election time in the form of 10% of any business they got in the area (A. 41). After Smith & Loveless was paid in full, Sopher met Smith following Smith's several entreaties to meet him (A. 43).

• • •

Matters relating to the revelation of the existence of the secret tape during the testimony of Sopher, a stipulation regarding it, and the ultimate contempt judgment against counsel for Sopher are detailed as relevant in the argument.

REASONS FOR GRANTING THE WRIT

I.

18 U.S.C. 3500 (the Jencks Act) was not complied with in that a secret tape recorded statement by the government's principal witness was not produced upon demand at the conclusion of his testimony, on the ground that one of the defendants was present when the statement was made, and that one of the acts charged in the indictment was in part evidenced by the content of the statement.

B. Alden Smith testified during the government's case in chief that after Smith & Loveless was paid in full for completing its delivery of machinery to Streator, he met Mayor Sopher in Chicago. After a short conversation he handed an envelope containing money to Sopher. The agents arrested Sopher when he pocketed it.

He did not originally testify that he carried a secret recording device for the FBI at the time of the conversation. That was first revealed in Sopher's cross examination, when the prosecutor asked Sopher questions in the form of long, verbatim quotations from a transcript made from the tape.

The quotations (A. 46-50) consisted in recitations by Smith for the benefit of the tape and the FBI. They revealed how Smith wanted *his* version of his previous dealings to be understood once the defendants were in court.

Thus Smith contrived to get the several defendants into "this deal on this payoff thing" (A. 46) implied long standing culpability in the defendants by asking why "you fellows ever start[ed] doing that sort of thing" (A. 47) cleared his own skirts by complaining that it would "make a tough cruel world" if he regularly had to do business

that way (A. 48) stated that the agreement "was 10%" (A. 48) that it made him nervous and how he had had to scrimp to fool internal revenue (A. 48-49) and told Sopher of payoffs in Las Vegas which took the form of gambling losses (A. 49-50). The entire thrust of Smith's conversation was to place himself in the most innocent of lights, the defendants in the most guilty. Sopher's responses were largely ambiguous or noncommittal.

The trial judge overruled objections based on the government's failure to provide the defense with a transcript following Smith's direct examination as 18 U.S.C. 3500 would seem to command. He likened the recording to a photograph of the meeting, which the government would not have to turn over following Smith's direct examination (A. 51).

The Court of Appeals rejected the trial judge's analogy. They arrived at the same result however. By re-writing the statute in a manner thought to exclude the present case. According to the court's new definition, statements under the act are " . . . *recital[s] of a past occurrence by a prospective witness* . . ." (Emphasis, the court's). Besides, said the court, the statement on the recording was not made " . . . *to an agent of the government* . . ." (Emphasis, the court's).

Even if the court were right as to the content of the statute, the recording in fact consisted in recitals of past occurrences—at least declarant Smith's version of them. And of course they were made by a prospective witness. Not just any witness. The star witness. And of course they were made to government agents. The agents supplied the device and the tape, and Smith returned the entire rig to them upon Sopher's arrest.

The position taken by the government portrays only an attempt by the government (thus far successful) to thwart the language of the Jencks Act.

II.

Secret tape recorded statements of conversations between defendants and government witnesses made during the occurrence of the events alleged in the indictment were put by the court beyond the reach of defense subpoenas, although material to the matters alleged in the indictment.

When the trial judge likened the tape recording of the Smith-Sopher conversation to a photo, a subpoena was served upon the government demanding its production under the compulsory process portion of the Sixth Amendment.

Not only was the tape and transcript of the Sopher-Smith conversation sought. So also were the tapes and transcripts of government witnesses Smith, Boender, and Bowlby made on four specific dates when they testified they had talked to the defendants (A. 53).

The trial judge said the defense was not entitled to subpoena government evidence. It was pointed out to him that the government made no claim of privilege (A. 53-54). He quashed the subpoena. He deprived the defense of evidence which the defense thought might tend to exculpate the defendants.

In *Brady* v. *Maryland,* 373 U.S. 83, this Court recently upheld the right to disclosure of evidence in the hands of the state. Yet it commended itself to the trial judge here that the United States is privileged not to respond to the force of the Sixth Amendment. The language of *United States* v. *Andolschek,* 2 Cir., 142 F. 2d 503, 507 (1944) is hard to improve upon: "The government must choose; either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully."

The entire concept of the government's retaining evidence which may tend to free a defendant is unwholesome and obnoxious.

It is true that in the case of the Smith-Sopher conversation, the government brought the document to light, brought it to light after the defense had rested so that little use could be made of it. Not even that was done in the case of the other recordings.

For aught it appears, those other recordings, whose existence the government has never denied (though called upon to do so if they do not exist) will demonstrate that Sopher's version of the arrangement is true; and that suggestions of payment for preferential treatment were originated by Smith & Loveless, not by the defendants.

III.

All defendants were prejudiced when the attorney for one of them was required by the trial judge to argue to the jury in favor of the prosecution's theory of the evidence, at the cost of suffering a worse penalty than the $1,000 contempt fine ultimately imposed upon him, for arguing a theory of the defense which, though helpful to his client, and supported in the record, was distasteful to the judge and prosecutor.

B. Alden Smith testified to a conversation with Mayor Sopher. Sopher, in defense related his version, differing slightly from that given by Smith. On the cross examination of Sopher, the government removed from its sleeve a tape recorded version, asking Sopher detailed questions purporting to be verbatim extracts from the tape. As to all or nearly all of the quotations, Sopher said that he did not recall their having been included in the conversation (A. 45-50).

It was thereafter stipulated that the statements as put by the prosecutor's questions were on the tape. Counsel for Sopher said he could stipulate that the parts read by the prosecutor were *part* of the conversation. Obviously counsel could not stipulate that they were the *entire* conversation, because Sopher had testified to some differences. To have stipulated otherwise would have been to stipulate that Sopher had perjured himself. It was thus arguable that the portions on the tape were correct (and it was so stipulated) and it was *still* arguable that what Sopher remembered was likewise true, but had not been recorded.

Smith resumed the stand on the government's rebuttal and admitted that he could have interrupted the tape, but denied that he did (A. 57-58). Defense counsel was not to be saddled with the truth of Smith's denial. Especially in light of the testimony of the FBI agent that he could not tell, from listening to the recording, that everything which occurred at the meeting was recorded (A. 58).

The prosecutor argued to the jury that Sopher had stipulated that he lied. Defense counsel promptly objected that when Sopher had stipulated that certain facts were true, he had not stipulated that something else was a lie. The judge overruled the objection (A. 59-60).

Counsel for Sopher sought to explain that while the tape was accurate and Sopher's version likewise accurate, Sopher's version was not on the tape, because Smith could interrupt the recorder when conversation not to his liking occurred (A. 60-61). It was likewise pointed out, truthfully (A. 63) that the government had stipulated that what the jury had heard was but part of the tape. Although counsel for Sopher had sought to explain the *absence* of the Sopher version from the tape, the judge said that counsel had stated "categorically" that Sopher's version would be corroborated by the tape (A. 63).

The jury was recessed in excess of two hours, during which the court threatened counsel (A. 62). Under compulsion of those threats the court required counsel to state to the jury upon its return that the record would not sustain his previous argument that the tape was interrupted (A. 67).

The Court of Appeals regarded this withdrawal by Sopher's attorney as a waiver by Sopher of his right to complain of the harm done him in having his lawyer tell the jury that the prosecutor's interpretation should be followed. Sopher was deprived of the effective assistance of counsel at the very instant his own lawyer surrendered to the court's requirement that his lawyer join the prosecution team.

Furthermore, every defendant in the courtroom was injured when one defendant's attorney was required to defect, in the presence of the jury. The jury knew nothing of the compulsion. They were elsewhere during the harangue. But they were present when the defense, as embodied by Sopher's counsel, told them that defense counsel were not to be trusted.

Right to counsel is denied where a lawyer is required to represent conflicting interests. *Glasser* v. *United States,* 315 U.S. 60, 70. *A fortiori,* the denial is worse where what is created by the trial judge is a direct conflict in the interests of the lawyer on the one hand and the defendant on the other. The threats of the trial judge here which created the conflict of interest were not idle vaporings. For his temerity in drawing what the trial judge felt to be an unjustified inference, counsel was adjudged guilty of a crime and fined $1,000. That counsel's conviction was reversed on appeal (*In re Oliver,* 347 F. 2d 415) is cold comfort to the client who, pragmatically, is justified

in wondering at the extent at which his conviction resulted from his lawyer's selfish balancing of competing interests.

We do not urge that a judge may never properly compel a lawyer. But we do urge that where a lawyer acts under the compulsion of threats by the courts to injure counsel, the court compels at its peril so far as any supposed waiver by the client is concerned. In short, waiver and compulsion are contradictory, so that the former cannot be predicated upon the latter.

Thus when Sopher's lawyer announced to the jury that he conceded the essential soundness of the prosecutor's position, it did not follow that Sopher adopted the position. Indeed it is to be doubted that Sopher changed his mind and believed the tape recording was complete because of threats made to his lawyer.

Accordingly, in the most literal sense, Sopher was deprived of counsel, the judge having converted his lawyer into a prosecutor by making him advance to the jury a position that was essentially that of the government.

* * * *

CONCLUSION

For the foregoing reasons, and for those applicable to them advanced by their co-petitioner, John Kerestes, your petitioners urge that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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Attorney for Raymond O. Sopher

CHARLES A. BELLOWS,
Attorney for John A. Ramza, Michael F. Ryan, and Matthew Tibbles

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 15057-15061

SEPTEMBER TERM, 1965—APRIL SESSION, 1966

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

RAYMOND O. SOPHER, JOHN KERESTES, JOHN A. RAMZA, MICHAEL F. RYAN and MATTHEW J. TIBBLES,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

JUNE 20, 1966

Before DUFFY, SCHNACKENBERG and KNOCH, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* Raymond O. Sopher, John Kerestes, John A. Ramza, Michael F. Ryan and Matthew J. Tibbles, defendants, appeal from their convictions of a violation of 18 U.S.C. § 1951. They were tried by a jury and the court sentenced them to prison terms.

Sopher was the mayor of Streator, Illinois, and his co-defendants were commissioners thereof.[1]

[1] 24 Ill. Rev. Stat. 1965, art. 4.

Count I of the indictment charged defendants with having obstructed interstate commerce by extortion and count II charged them with conspiracy to commit the offense charged in count I, all in violation of the Hobbs Act, 18 U.S.C. § 1951.

There was evidence tending to prove the following facts:

On November 7, 1960, Charles H. Boender, a sales representative of Stannard Power Equipment Company, which was agent in Streator for Smith & Loveless, made a sales talk to said defendants on a proposed sewer project in that city. Whereupon Sopher asked Boender "what it was worth" to him to get the job. An unidentified commissioner stated that "it must be in cash".

On January 5, 1961, independent engineers Warren & Van Praag, Inc., submitted plans and specifications for the project, wherein Smith & Loveless was designated as the base bid supplier for the package lift stations.

On March 28, 1961, in Boender's presence, president Bowlby of Stannard thanked Sopher for the consideration being given Smith & Loveless equipment and expressed the hope that the company was going to be successful in doing business with the contractor. Sopher replied that this was possible, provided they received in cash 10% of the contract or bid price in connection with such an agreement. In addition Sopher suggested that the price could be increased by $3,000 to take care of the internal revenue tax. However, Bowlby told Sopher that Stannard Company could not participate but that he would relate the proposition to Smith & Loveless.

On April 10, 1961, Boender and Smith, managing director of Smith & Loveless, met in Streator. Being unable

to locate Sopher, they called on defendant Kerestes, who said he had explained to Boender previously that "we wanted 10 percent of your bid price to the contractor to have the city approve" the use of Smith & Loveless equipment. When Smith asked how "we might accomplish the matter of providing this money" Kerestes explained: "* * * we want the cash, we want it tax paid, and it is your problem how you get it. * * *"

Finding Mayor Sopher at the city hall, Boender and Smith were told by him: "We want 10 percent of the bid price in cash." While Smith made no commitment, he testified that he left Sopher with the impression that "I probably would [go along with the deal]", thus leaving the matter in abeyance so that the Federal Bureau of Investigation could be contacted, which was done on April 11, 1961.

On April 17, 1961, Farthing Brothers, general contractors, after having received bids from the subcontractors, made sealed bids on pump stations manufactured by Smith & Loveless, Chicago Pump Company and Tex-Vit. Farthing Brothers was the lowest bidder on the total sewage project.

On April 19, 1961, Boender telephoned Sopher and asked whether he was satisfied with the arrangements made between Sopher and Smith. Sopher said that he was and that he would have to satisfy "the commissioners".

On June 7, 1961, a contract was entered into between the city and Farthing Brothers in which Smith & Loveless was the only subcontractor specifically named. Both Boender and Smith believed that Smith & Loveless received the contract because of the agreement to pay the 10% of its contract price of $30,868.

On February 15, 1963, Smith & Loveless received its final payment from Farthing Brothers and three days later Sopher called Boender to arrange a meeting.

On May 7, 1963, Smith, Sopher and his twelve-year-old daughter met in a room in a Chicago hotel. On Smith's person federal agents had a hidden recording device, and $3,087 in identified money. The recorded conversation thereon is in conformity with the facts herein enumerated, culminating in Smith's statement "* * * well, I might as well give you the money," (which he did). Federal agents then appeared, arrested Sopher and recovered the listed money. Whereupon Sopher contended the money received was a political contribution.

1. We hold that the evidence supports the charges in the indictment and that the indictment includes all elements of the offenses charged.

As the Supreme Court said in *Stirone* v. *United States*, 361 U.S. 212 (1960) at 215:

> "* * * It was to free commerce from such destructive burdens that the Hobbs Act was passed. *United States* v. *Green*, 350 U.S. 415, 420."

and at 218, the court added:

> "* * * there are two essential elements of a Hobbs Act crime: interference with commerce and extortion. * * *"

We agree with government counsel when they say that the conduct of defendants necessarily produced a fear of economic loss by Smith & Loveless. *United States* v. *Kramer*, 7 Cir., 355 F.2d 891, 897 (1966).

We hold that the violations of the Hobbs Act charged in the indictment were supported by the proof in the record.

2. However, defendants contend that the transcript and tape recording of the conversation on May 7, 1963 between Smith and Mayor Sopher were statements producible under 18 U.S.C.A. § 3500. There were motions by the defense to strike the testimony of Smith, grant a mistrial, and to produce said statements, which were respectively denied.

While the record indicates that the government turned over to the defendants various statements of witnesses in compliance with § 3500, it took the position below and also in this court that the court did not err in denying defendants' motion for the production of the tape recording of the May 7, 1963 conversation and the transcript thereof. The district court took the position that § 3500 does not encompass the tape recording of that conversation.

A § 3500 statement is a recorded recital of past occurrences made by a prospective prosecution witness. From the very nature, necessarily it is made after those events have taken place. If a prosecutor, in reliance on the statement, uses as a witness the maker thereof as a part of the government's case, the statement must be produced for the use of defense counsel. But a concurrent tape recording of a conversation between the payer and the recipient of an alleged cash bribe is obviously of contemporaneous sounds. The result is a preservation of a conversation just as it was spoken. It is direct evidence relevant on the issue of the alleged guilt of the defendants on trial. Made when the allegedly extorted bribe money was being paid, the tape recording in this case is of the actual voices of the briber and the bribee. It is therefore *not a recital of a past occurrence by a prospective witness* and is not within the general purview of § 3500. More-

over, it does not fall within the technical requirements of paragraph (e)[2] thereof, because it is not a written statement made and signed by a government witness or adopted or approved by him, nor is it a recording or transcription thereof which is a substantially verbatim recital of an oral statement by said witness *to an agent of the government,* contemporaneously recorded with the making of such oral statement.

We hold that there was no error committed in the denial of the motions of defendants to strike Smith's testimony and for an order for production of said statements, or to grant a mistrial.

3. During the government's case in chief, Smith testified as to the May 7, 1963 conversation with Sopher at the Water Tower Inn. Sopher, as a defense witness, under cross-examination answered evasively when asked about statements contained in the recording attributed to him by Smith, who testified that he recognized Sopher's voice when the playing of the tape was repeated.

A transcript of the tape had been delivered by the government to defense counsel at their suggestion. The tape was played in their presence, but outside the presence of the jury and of any spectators, after the defendants severally and personally agreed to the procedure.

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[2] § 3500 (e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement. * * *

Counsel for Sopher assumes in this court that "certain parts of the conversation as testified to by Sopher, were not on the tape" and he points out as "a possible explanation" that he reminded the jury that Smith controlled the operation of the recording device "and could" delete statements by Sopher which were not to his liking, by pushing the "off" button. Sopher's counsel points out that the Federal Bureau of Investigation agent had instructed Smith in the mechanical use of the recording device.

On rebuttal by the government, Smith testified that the tape recording fully, truly and accurately portrayed the conversation with Sopher on the occasion in question. He further testified that only general instructions regarding the operation of the device were given. Moreover, the lack of a basis for the attack on the reliability of the tape was acknowledged by counsel for Sopher, when he then stated:

> "Vis-a-vis my comments just before the recess, I should like the jury to understand that in my opinion the record will not sustain the inference that the machine which Mr. Smith had fastened to his body on May 7, 1963, was in fact turned on or off by Smith during that conversation, and I think it also will not sustain the inference that there was matter on that tape which tended to corroborate Mayor Sopher's version of the conversation but which was not stipulated to."

As a matter of fact, our attention has not been directed to any conversation on the occasion in the Water Tower Inn which the tape failed to record. It is therefore improper for us to speculate what would be missing from the record if Smith had arrested the operation of the machine temporarily at any time.

4. Defendant Kerestes contends that the court erred in failing to grant him a severance from Sopher, on the ground that the latter had made admissions and statements tending to implicate Kerestes, and also that he was unable in a joint trial with Sopher to compel effective testimony from his co-defendant. We fail to find sufficient basis in the record for reversing, especially as all defendants were charged as members of a conspiracy under count II of the indictment. Certainly the matter of a severance was within the sound discretion of the district judge and there is nothing in the record to indicate an abuse of such discretion when the motion for severance was overruled. *Opper* v. *United States*, 348 U.S. 84, 95 (1954).

We find no other ground advanced by Kerestes for a reversal sufficient to justify that action.

5. Under all the circumstances shown by the record, we hold that the court properly denied the respective motions for severance, judgment of acquittal, mistrial and a new trial by defendants Ramza, Ryan and Tibbles.

We have considered their contentions that there was a fatal variance between the indictment and the proof. Their counsel reason that the indictment alleged defendants threatened Smith & Loveless, Inc. that its bid would not be accepted unless it agreed to make a payment to them, whereas the evidence showed that Smith & Loveless only made a proposal to the general contractor for the work. We find there was evidence tending to prove that defendants' conduct necessarily produced a fear of economic loss by Smith & Loveless. This evidence is sufficient to support the jury's verdict, on the theory that money had been extorted by defendants by fear, induced by threats that a bid of the contractor would not be accepted unless Smith & Loveless agreed to pay 10% of the bid price, thereby affecting interstate commerce.

6. We have examined the instructions and considered the objections thereto raised by defendants in this court. We find the objections not well taken.

7. While there is a criticism of the action of the trial court, in what counsel for defendants Ramza, Ryan and Tibbles say was a reprimand of Sopher's trial counsel, our reading of the entire transcript convinces us that it was not prejudicial to the defendants in any way.

8. Defendants Ramza, Ryan and Tibbles contend that the court committed error in admitting in evidence conversations at the May 7, 1963 meeting between Sopher and Smith which were made "after the completion of the conspiracy." However, we do not agree that the conspiracy had ended when these conversations took place. The conspiracy was still in effect when the meeting took place, the money was obtained by Sopher, and each of the participating persons (Sopher and Smith) continued in their discussion as to the payment of the money to Sopher and its subsequent disbursement to the other defendants in their respective shares. The conspiracy did not terminate until the arrest of Sopher.

For all these reasons, the judgments from which these appeals were taken are affirmed.

Judgments affirmed.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 451

JOHN KERESTES, PETITIONER

v.

UNITED STATES OF AMERICA

No. 455

RAYMOND O. SOPHER, JOHN A. RAMZA, MICHAEL F. RYAN AND MATTHEW TIBBLES, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. No. 451 App. A; Pet. No. 455 App.; C.A. 1–8) [1] is reported at 362 F. 2d 523.

[1] "C.A." refers to the record of the proceedings in the court of appeals. "R." refers to the volume containing the various papers filed in the district court. "Tr." refers to the three-volume, typewritten transcript of the trial proceedings.

JURISDICTION

The judgment of the court of appeals was entered on June 20, 1966. Petitions for rehearing were denied on July 19, 1966. The petition for a writ of certiorari in No. 451 was filed on August 17, 1966, and the petition for a writ of certiorari in No. 455 was filed on August 18, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court abused its discretion in denying severance as to petitioner Kerestes.

2. Whether prejudicial error occurred by reason of the fact that the government, while delivering to the defense eight written statements by a government witness pursuant to 18 U.S.C. 3500, did not then deliver a transcript of a wire recording of a conversation between the witness and petitioner Sopher, where the transcript of the recording was thereafter delivered to the defense and the defense made no request to recall the witness for further examination.

3. Whether a mistrial was required because the trial court interrupted the final argument of counsel for petitioner Sopher to state that counsel was arguing inferences which were not warranted by the evidence, where, after a conference, defense counsel agreed that the inferences were not warranted.

STATEMENT

Petitioners were convicted by a jury, in the United States District Court for the Northern District of Illinois, under a two-count indictment charging that

they obstructed, delayed, and affected interstate commerce by extortion, and that they conspired to do so, in violation of the Hobbs Act, 18 U.S.C. 1951.[2] On December 1, 1964, petitioner Sopher was sentenced to imprisonment for four years; the other petitioners were each sentenced to imprisonment for three years (R. 298–302). The court of appeals unanimously affirmed the convictions.

1. The evidence disclosed that in 1960 petitioner Sopher was the mayor of Streator, Illinois, and petitioners Kerestes, Ramza, Ryan and Tibbles were commissioners of the city. In November 1960, petitioners met in the mayor's office with one Boender, a representative of a company acting as a sales agent for Smith and Loveless, a Kansas-based firm which manufactured pump equipment (Tr. 14–15, 49, 270–271). After Boender explained the use of such equipment for a proposed sewer project by the city, petitioner Sopher asked Boender what it was worth to him to get the job (Tr. 19). One of the other petitioners stated that "it must be in cash" (*ibid.*). Boender said he would discuss the matter with his superiors (*ibid.*).

In March 1961 Boender and one Bowley, the president of the sales agency, met with petitioner Sopher and indicated that they hoped Smith and Loveless

[2] "Conduct that brings about a state of mind of fear of financial loss constitutes extortion under the Hobbs Act." *United States* v. *Kramer*, 355 F. 2d 891, 897 (C.A. 7), vacated and remanded in part for entry of an appropriate sentence, 384 U.S. 100. See also *United States* v. *Dale*, 223 F. 2d 181, 183 (C.A. 7); *United States* v. *Postma*, 242 F. 2d 488, 492 (C.A. 2), certiorari denied, 354 U.S. 922. See note 12, *infra*.

would be chosen to supply the pump equipment for the sewer project (Tr. 19–21, 239–241). Petitioner Sopher said this would be possible if he and the commissioners received ten percent of the bid price in cash (Tr. 26, 241–242). Bowley replied that his company could not participate in such an arrangement, but stated that he would relate the proposition to Mr. Smith, the managing director of Smith and Loveless (Tr. 26, 242, 270).

On April 10, 1961, Smith, accompanied by Boender, met petitioner Kerestes in Streator and stated that he did not understand what was expected in order to secure the use of Smith and Loveless pump equipment for the sewer project (Tr. 28, 271–274). Petitioner Kerestes explained "[W]e wanted 10 percent of your bid price to the contractor to have the city approve [Smith and Loveless] equipment on the job. * * * [W]e want the cash, we want it tax paid, and it is your problem how you get it" (Tr. 275; see Tr. 32). Immediately thereafter Smith and Boender talked to petitioner Sopher at the city hall (Tr. 30, 275–276). Petitioner Sopher confirmed that "We want 10 percent of the bid price in cash" (Tr. 32). Smith felt that his firm had no chance of obtaining the pump contract without paying the ten percent (Tr. 282–283). He made no commitment to Sopher, but suggested that he probably would comply (Tr. 32, 276). The next day Smith reported the matter to the F.B.I. (Tr. 276–278).

On May 1, 1961, after three potential pump suppliers had submitted their bids to the general contractors, and after the city had received the bids of the general contractors for the complete sewer project

(Tr. 630), Boender telephoned petitioner Sopher and asked if he and the commissioners were satisfied with the arrangements made with Smith (Tr. 35–36). Petitioner Sopher indicated that some of the commissioners were not entirely satisfied, and asked Boender to come to Streator (Tr. 36). That evening, after the regular council meeting, petitioners met privately with Boender in the mayor's office (Tr. 37). After discussing "how they could be sure that Smith and Loveless could be trusted to go along with this deal" and deciding that their power to withhold payment to the general contractor would afford sufficient control, petitioners agreed that Smith and Loveless should be awarded the order for the pumps (Tr. 39).

In June 1961, the city of Streator and the low-bidding general contractor signed a contract for the sewer project in which Smith and Loveless was specifically designated as the supplier of the pump equipment (Tr. 551, 557, 645).[3] Smith and Loveless received the order at its bid price of $30,686 and thereafter delivered and installed the equipment (Tr. 283–284).

In November 1961, petitioner Sopher telephoned Smith and asked if they could meet to complete their agreement (Tr. 284, 286). Smith replied that he intended to wait until his company had received total

[3] The successful general contractor had offered in its bid to use the pump equipment of any of three designated manufacturers, including Smith and Loveless (Tr. 375, 548, 550–551). Although the use of Smith and Loveless pumps had been recommended by the city's consulting engineers (Tr. 592, 596, 636–637), the city council was not bound to accept the engineers' recommendation (Tr. 673–675).

payment from the general contractor (Tr. 286). Final payment was received by Smith and Loveless on February 15, 1963 (Tr. 286). Three days later petitioner Sopher contacted Smith to arrange a meeting (Tr. 48–49). It was agreed that $3,087 in cash, ten percent of the contract price, would be paid in bills of small denomination (Tr. 288).

On May 7, 1963, at a motel restaurant in Chicago, the meeting took place under F.B.I. surveillance (Tr. 290–291, 387–388). Smith carried a concealed wire recorder which had been placed on his person by an F.B.I. agent (Tr. 1105–1106, 1118–1119). In the course of their conversation, Smith and petitioner Sopher discussed the fact that petitioners Ryan and Tibbles had failed to win reelection to the city council, but petitioner Sopher explained that under the agreement they were still to receive their shares of the $3,087 and that they had urged him to meet promptly with Smith (Tr. 292, 879–880, 882–884, 1133). Petitioner Sopher then volunteered that he intended to have the City of Streator pay Smith and Loveless $400 for repairs which the company had made on the installed pumps, despite the fact that the pumps were still covered by a warranty and the city was under no obligation to pay (Tr. 292, 885–888, 1133). He added: "You will get your money back one way or the other" (Tr. 888, 1133). Smith produced an envelope containing $3,087 (Tr. 385–386, 405), and handed it to petitioner Sopher (Tr. 293, 388). Sopher placed the envelope in his coat pocket (Tr. 388). He was arrested shortly thereafter by F.B.I. agents who had observed the transaction (Tr. 293,

389). Sopher protested to the agents that the envelope contained only a gratuitous political contribution (Tr. 402–403).

2. At trial, Smith testified, *inter alia,* concerning his conversation with petitioner Sopher on May 7, 1963 (Tr. 291–293). Eight statements by Smith to government agents, including a statement relating the substance of the May 7 conversation, had earlier been produced for the use of the defense pursuant to 18 U.S.C. 3500 (Tr. 293–294). Subsequently, petitioner Sopher testified concerning the same conversation (Tr. 844–845). He referred to the money in the envelope as funds Smith had said he was going to "contribute" to him, and recounted the discussion of the repair bill as an explanation to Smith that the payment by the city could not be authorized since the pumps were still covered by a warranty (Tr. 845). On cross-examination the government attorney inquired if petitioner Sopher recalled whether the conversation had contained certain language, reading a series of excerpts from a transcript (Tr. 878–897, 907). Petitioner Sopher responded that some of the dialogue could have been included in the conversation, but stated that he did not recall most of the quoted passages (Tr. 878–897). During a recess, counsel for the petitioner Sopher ascertained that the government attorney had been reading from a transcript prepared from a recording of the conversation (Tr. 906–907).

On resumption of the trial proceedings, counsel for petitioner Sopher asserted that the transcript of the recording should have been proffered to the defense

as a statement of Smith subject to production under 18 U.S.C. 3500 at the conclusion of Smith's testimony (Tr. 908, 912). He moved that Smith's testimony be stricken and that a mistrial be declared because of such non-production (Tr. 915). The court denied the motions (Tr. 930–931), ruling that the recording of Sopher's conversation with Smith did not constitute a statement by Smith within the purview of Section 3500 (Tr. 922–924, 927–928, 984). Subsequently counsel for petitioner Sopher attempted to subponea from the government any transcripts of statements or recordings by Boender, Bowlby, or Smith in early 1961 (Tr. 982–983; R. 181). The trial court, after having examined papers tendered him by the government as the only papers approximating the objects described in the subponea, quashed the subponea and further ruled that the papers before him were not subject to production under 18 U.S.C. 3500 (Tr. 1007–1008).[4]

After the defense concluded its case, the government attorney indicated that as part of his rebuttal he intended to play to the jury the recording of the May 7 conversation between Smith and petitioner Sopher (Tr. 1050–1051). Preliminarily, at the government attorney's suggestion, the recording was played for the defense out of the presence of the jury

[4] The tendered papers appear in the certified record within an envelope which is marked "Statements held (1) Not to be Sec. 3500 statements (2) Not to be produceable [*sic*] pursuant to subponea under Rule 17, F.R.Cr.P." and which is signed by the trial court. The envelope contains a transcript of the Sopher-Smith conversation of May 7, 1963, and a transcript of a local radio announcer's interview with Sopher on May 8, 1963.

(Tr. 1050, 1073).[5] Defense counsel had been given a typewritten transcript of the same conversation in order that they might more easily follow the recording (Tr. 1058–1059, 1063). After hearing the tape recording, the trial court ruled that it was admissible in rebuttal (Tr. 1092–1095). The court suggested, however, that a stipulation might be substituted in lieu of playing the recording for the jury, in order that the government's evidence of the conversation not be unnecessarily cumulated (Tr. 1096, 1100). A stipulation was reached and, after presentation of the government's foundation evidence,[6] it was read to the jury by the court (Tr. 1133):

> It is stipulated by all the counsel and the parties that the statements read by [the government attorney] in that cross-examination [of petitioner Sopher in regard to his conversation with Smith in Chicago] are true and correct as reflected on the transcription of that conversa-

[5] In order to afford better audibility, the recording which was played was a tape recording which had been made from the original wire recording. The government had offered to play the original wire (Tr. 1067).

[6] Smith and an F.B.I. agent each testified that, just before Smith's conversation with petitioner Sopher, the agent placed a small wire recorder on Smith's person and turned it on, and that after the conversation the agent turned off the recorder and removed it from Smith (Tr. 1105–1106, 1118–1120). Smith also testified that the recorder remained on throughout the conversation, that he heard the tape played in chambers, and that the tape accurately portrayed the entire conversation he had had with Sopher (Tr. 1106). Two other F.B.I. agents testified that they had made the tape recording from the original wire recording and that the two were identical (Tr. 1122–1126). Both the wire and the tape were received in evidence (Tr. 1131), but neither was played to the jury.

> tion which was made on the wire which is in evidence as Government Exhibit 14.

Counsel for petitioner Sopher added that "those matters appeared among others; the others are not in evidence" (Tr. 1133). The court then confirmed that (Tr. 1133–1134):

> [W]e are not playing the whole transcription because some of it is irrelevant, some of it you have heard as you heard the statements already, but these matters are stipulated to be true and correct and the rest of the tape is not being directed to the attention of the jury at this time.

At no time after hearing the recording and receiving the transcript of the recording did any of the defense counsel request that Smith be recalled to the witness stand for further examination.

3. During the final portion of his summation, counsel for petitioner Sopher argued that the version of the Chicago conversation developed by Sopher in his testimony was not necessarily in conflict with the stipulatedly accurate dialogue read during Sopher's cross-examination. Counsel pointed out that the recording device had an "on-off" button, and argued (Tr. 1268–1269):

> [W]henever, I am sure, anything that was a little unsatisfactory so far as what Smith wanted to develop on this tape was concerned all Smith had to do was to reach inside his coat and punch a button; and so, of course, what Mayor Sopher has told you from the stand or much of it is not on the tape. That is perfectly understandable.

> Furthermore, the government has stipulated with us that what you did hear was but part of the tape that they do have. The rest of it is not—

The government attorney interposed an objection and the court responded (Tr. 1269):

> Yes, Mr. Oliver. I am going to play the whole tape to the jury right now. You have made it impossible for the closing argument in this case to proceed with those statements with reference to the statement about turning the machine on and off. I am going to let the jury hear the whole tape because there are inferences in there which I think are not warranted by the evidence that has been heard.

Counsel replied (Tr. 1270):

> I think they are, your Honor. I would want to be heard out of the presence of the jury.

The jury was excused (Tr. 1270). During the ensuing discussion the court observed that it had suggested a stipulation as to the contents of the recording in order to avoid an unnecessary cumulation of the government's evidence of the incriminating conversation, and stated it felt that counsel had taken improper advantage of the situation by arguing inferences which a playing of the recording would plainly have negated (Tr. 1275, 1282–1284, 1286–1287, 1294–1295, 1304). The court stated that to remedy the matter the tape could be played for the jury (or the transcript of the tape read to the jury) in order that the jurors might draw their own informed conclusions as to the existence of any basis for the argued inferences, or else that counsel could withdraw that portion of

his argument (Tr. 1300–1301, 1304–1306, 1308–1309, 1311, 1313–1315, 1322, 1329–1332). Counsel chose the latter alternative (Tr. 1275, 1300–1301), with the express consent of petitioner Sopher (Tr. 1333) and counsel for petitioners Ramza, Ryan, and Tibbles (Tr. 1328), and with the acquiescence of counsel for petitioner Kerestes. Upon the return of the jury, counsel stated (Tr. 1335–1336):

> Vis-a-vis my comments just before the recess, I should like the jury to understand that in my opinion the record will not sustain the inference that the machine which Mr. Smith had fastened to his body on May 7, 1963, was in fact turned on or off by Smith during that conversation, and I think it also will not sustain the inference that there was matter on that tape which tended to corroborate Mayor Sopher's version of the conversation but which was not stipulated to.

Immediately thereafter the court instructed (Tr. 1336–1337):

> Let me simply observe that in light of those statements the jury will disregard any inferences which might have been drawn had those statements not been withdrawn. And let me say further, as I will tell you formally in the instructions, that any colloquy which I may have with counsel has no bearing whatsoever on the determination which you must make of whether or not the government has established beyond a reasonable doubt the guilt of the defendants. Counsel are not on trial. They are simply representing the people who are on trial and my job is to preside over a trial and to

> maintain as far as possible an orderly and fair proceedings [*sic*]. So I want you to understand that the fact that there may have been colloquy between counsel and me is not in any way to affect your judgment as to the merits of the position of any of the defendants in this case.

Counsel for petitioner Sopher then resumed and completed his final argument (Tr. 1337–1341). During its general charge to the jury the court again instructed that no inference whatever as to any defendant was to be drawn from the above colloquy with counsel, and that the case was to be decided solely on the basis of the evidence (Tr. 1385, 1399). After the jury had retired, counsel for all petitioners renewed their motions for a mistrial (Tr. 1406), which had first been made during the discussion in chambers (Tr. 1295–1296, 1299–1300, 1334). The motions were denied (Tr. 1406).[7]

ARGUMENT

1. The denial of petitioner Kerestes' motion for a severance was within the sound discretion of the trial court. The defendants, who acted together in what was essentially one transaction, were properly tried together. The court's clear and repeated admonitions to the jury as to the limited consideration to be given

[7] In a special proceeding after the verdicts had been returned (Tr. 1416), the trial court held counsel for petitioner Sopher in contempt of court for engaging in the above improper argument to the jury (Tr. 1420–1422). On appeal, the court of appeals reversed the contempt conviction, holding that although the argument was improper, the record did not show that the impropriety was deliberate, contemptuous, or obstructive. *United States* v. *Sopher*, 347 F. 2d 415, 418 (C.A. 7).

the statements of the individual petitioners (Tr. 21–25, 272–273, 285, 1396–1398, 1400) avoided any confusion which might otherwise have arisen because of the joint trial. *Opper* v. *United States*, 348 U.S. 84, 95. The argument of petitioner Kerestes, that the joint trial precluded his calling his co-defendants as witnesses in his behalf, is unrealistic. There is nothing in the facts of this case to justify an assumption that a co-defendant would have been more willing to waive his privilege when called as a witness at a separate trial than to take the stand at a joint trial. *Gorin* v. *United States*, 313 F. 2d 641, 645–646 (C.A. 1), certiorari denied, 374 U.S. 829.[8]

2. No prejudicial error occurred by reason of the fact that, at the conclusion of Smith's direct examination, the government did not then deliver to the defense the transcript of the recording of the May 7 conversation between Smith and petitioner Sopher. A transcript of such a conversation between a defendant and the victim of the alleged crime has been held not to be a statement subject to production under 18

[8] The holding in the case on which petitioner Kerestes relies (Pet. No. 451, pp. 25–26), *United States* v. *Echeles*, 352 F. 2d 892 (C.A. 7), is limited to its particular facts. There, in assessing whether the co-defendant (Arrington) would have testified for Echeles in a separate trial, the court noted (352 F. 2d at 898):

> [I]t would in fact seem more likely than not that Arrington would have testified for Echeles for the reason that three times previously, in open court, Arrington had voluntarily exculpated Echeles, apparently contrary to his own penal interest.
>
> * * * [W]e hold merely that, having knowledge of Arrington's record testimony protesting Echeles' innocence * * *, it was error to deny the motion for a separate trial.

U.S.C. 3500, *Battaglia* v. *United States*, 349 F. 2d 556, 560 (C.A. 9), certiorari denied, 382 U.S. 955.

In any event, even prior to Smith's testimony on direct examination, the government had turned over to the defense eight statements by Smith to government agents, including a statement dated May 8, 1963, in which Smith had accurately related the substance of the conversation with petitioner Sopher (Tr. 293–294).[9] Since the defense possessed this latter statement for use in cross-examination, the absence of the transcript of the recording did not operate to petitioners' prejudice. *Killian* v. *United States*, 368 U.S. 231, 243–244; *Rosenberg* v. *United States*, 360 U.S. 367, 371. Additionally, after the several counsel for petitioners had been given a copy of the transcript later in the trial, and after they had heard the recording itself, none requested that Smith be recalled for further questioning regarding the conversation. Petitioners thus had an opportunity to use the transcript in examining Smith, but made no attempt to exercise it.[10]

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[9] The statement is set forth in an F.B.I. report dated May 9, 1963, the date used to refer to the statement at trial (Tr. 294). A copy has been lodged with the Clerk of this Court.

[10] No need thus exists for this Court to consider whether the Seventh Circuit's construction of 18 U.S.C. 3500 (Pet. No. 451, App. A, pp. 5–6) was proper. Similarly, no question under this Court's decision in *Brady* v. *Maryland*, 373 U.S. 83, is presented here, despite petitioners' purported reliance on that case. No suppression of evidence was in fact involved here, since pe-

Petitioners, other than petitioner Kerestes, further argue that the trial court improperly quashed the subpoena directed to any other recordings of conversations between petitioners and Smith, Boender, or Bowlby in early 1961 (Pet. No. 455, pp. 9–10). There were no such recordings. At the time the matter was first raised, the trial court pointed out to the defense that the events concerning which counsel sought possible government recordings had taken place prior to the time the government had been informed of the existence of the offense, and that, therefore, there could be no such recordings (Tr. 941). When the defense persisted, and the government tendered the court the only two transcripts of recorded conversations in its possession—the Sopher-Smith conversation of May 7, 1963, and petitioner Sopher's radio interview of May 8, 1963—the trial court properly quashed the defense subpoena (Tr. 1007–1008; see note 4, *supra*).[11]

3. The trial court did not abuse its discretion in refusing to declare a mistrial following the interruption of the final argument of counsel for petitioner Sopher. The jury heard only the government's ob-

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titioners' counsel were provided with a transcript of the tape recording during the course of the trial and had an opportunity to cross-examine Smith with respect thereto.

[11] Apart from the Jencks Act question which they raise with respect to wire recording of the Sopher-Smith conversation of May 7, 1963, none of petitioners here assert that it was improperly used, in a constitutional sense, at trial. Thus, no Fourth Amendment issues are presented here. Compare *Lopez* v. *United States*, 373 U.S. 427, and the argument in petitioner's brief, pp. 26–36, in *Osborn* v. *United States*, No. 29, this Term. See Pet. No. 451, p. 16.

jection, the court's statement that counsel had made it impossible to proceed without playing the tape to the jury "because there are inferences in there which I think are not warranted by the evidence that has been heard," counsel's statement that he thought they were warranted, and, after the conference in chambers, counsel's statement that in his opinion the record would not sustain the two inferences involved (Tr. 1269–1270, 1335–1336). In view of the obvious impropriety of counsel's remarks, to which objection was made, the relatively innocuous nature of the exchange, and the court's prompt, repeated admonitions that the colloquy was to have no bearing on the jury's determinations and that no inference whatever as to any defendant was to be drawn from it (Tr. 1336–1337, 1385, 1399), there were no grounds for a mistrial. See *Shockley* v. *United States,* 166 F. 2d 704, 711–712 (C.A. 9), certiorari denied, 334 U.S. 850; *Fredrick* v. *United States,* 163 F. 2d 536, 547–548 (C.A. 9), certiorari denied, 332 U.S. 775.

Petitioner Sopher also contends that he was deprived of effective representation of counsel since counsel was forced to abandon a defense. Counsel, however, did not abandon anything he could properly have asserted. The two inferences urged in his argument would plainly have been negated by a playing of the tape—a tape which had been ruled admissible but for which a less revealing stipulation had been substituted to avoid cumulating the government evidence. Counsel's attempt to take advantage of the situation was found improper by both the trial court and by the court of appeals in reviewing the later contempt conviction (347 F. 2d 415, 418). Moreover, had counsel

felt that the argued inferences were supportable, he could have elected to adhere to his argument and to have the tape played for the jury. Both he and petitioner Sopher, however, favored the retraction (Tr. 1333).[12]

CONCLUSION

For the reasons stated, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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[12] Petitioner Kerestes questions, but does not argue, whether the facts of this case involve an interference with interstate commerce within the meaning of the Hobbs Act, 18 U.S.C. 1951 (Pet. No. 451, p. 3.) The evidence demonstrated that petitioners instilled in Smith the fear that his company's bid to sell the Kansas-made pumps to the Illinois city would not be accepted or approved unless Smith and Loveless agreed to pay ten percent of the bid price. Had the bid not been accepted, there would have been no interstate shipment of pumps. Since the statute outlaws interference in any way or degree, the interference in the present case was sufficient. Cf. *Stirone* v. *United States*, 361 U.S. 212, 215; *Carbo* v. *United States*, 314 F. 2d 718, 732 (C.A. 9), certiorari denied, 377 U.S. 953. See note 2, *supra*.

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